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NJFDC Judge Politan's March 1996 Decision
Shows the 1995 Referred Issue Has Been Resolved

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NJFDC Judge Politan's March 1996 Decision was vacated on primary jurisdiction grounds by the Third Circuit. Judge Politan's May 1995 referral was sent to the FCC in 1996. Judge Politan in May 1995 simply wanted to know if 2.1.8 permitted traffic only transfers or if the tariff did not prohibit traffic only from transferring.

NJFDC March 1996 Judge Politan Decision Page 15-16:

> The Central issue in this controversy is whether plaintiffs may fractionalize "plans" as contracted between **AT&T and its aggregators** and as governed by Tariff F.C.C. No 2. Specifically, the question is whether plaintiffs may transfer traffic under a plan without transferring the plan itself in order to obtain more attractive discounts for end users. **The issue of whether Tariff FCC No. 2 permits fractionalization has been referred by this Court to the F.C.C**.

TR 8179 tariff page is at Exhibit A in plaintiff's February 5th 2016 FCC filing. AT&T's TR 8179 tariff filing was issued February 16th 1995 and scheduled to be effective March 2nd 1995. The following is the substance of AT&T's Substantive Cause Pleading to the FCC which attempted and failed to retroactively change 2.1.8. It attempted to force the plan to transfer so as to force the plan obligations to transfer, when a substantial amount of locations were being transferred. The following is the text:

> "If a customer seeks to transfer, to one or more other Customers, all or **substantially all of the locations** associated with an existing Custom Network Services volume or term plan or Contract Tariff, and the anticipated result of such a transfer would be that the usage and/or revenue from the remaining locations associated with the volume or term plan or Contract Tariff (based on the last 12 months of usage) would **not meet the usage and/or revenue commitment of the volume or term plan** or Contract Tariff, the transfer **will be deemed a transfer of the associated volume or term plan** or Contract Tariff to such other Customer(s), and may only be completed in accordance with this section."

Substantive Cause Pleading means AT&T pleads that it has the right to retroactively change the tariff as AT&T asserts it is already implicit what the tariff means and AT&T seeks to modify the tariff language retroactively to make it explicit. AT&T's pleading was in hope the FCC would retroactively apply it to cover the CCI-PSE traffic only transfer. If the FCC believes it is not implicit and it would actually be a change in the terms and conditions the proposed language change goes into effect on a **prospective basis**.

AT&T replaced Tr8179 with Tr9229. AT&T misrepresented to Judge Politan that Tr9229 would then resolve whether or not the CCI-PSE transfer was to go through.

March 1996 NJFDC Page 4-5

> "For the purposes of the instant determination, it is uncontested that AT&T withdrew Transmittal 8179 on June 2, 1995. As such, the FCC ruling which the Opinion anticipated (**premised on the then-existing facts**) could not issue. However, in August of 1995, AT&T represented to the Court that it had withdrawn Transmittal 8179 at the behest of the FCC, and was in the process of revising the transmittal in preparation for its resubmission. In its August 28, 1995 letter to the Court AT&T stated:
>
> > "AT&T has since **revised** the Transmittal language that would clarify existing rights and obligations when a customer desirers to transfer a large portion of traffic of term plans available under Tariff No 2…..AT&T has also planned to include other proposed tariff revisions in this new (and yet unnumbered) Transmittal."
>
> AT&T's correspondence of August 28, 1995, pp.2-3.
> AT&T professed to the Court that it had incurred delays due to its seeking comment from the Telecommunications Resellers Association, but that it intended to submit its revised tariff transmittal with the FCC in September of 1995. As such, at that time, the Court took the matter under advisement, believing that the urgency of plaintiffs' motion for reconsideration was diffused by AT&T's representation. However, in their October 10, 1995 correspondence to the Court, plaintiffs represented that AT&T had still not submitted its revised transmittal with the FCC. Moreover, plaintiffs reiterated their **consistent contention that any FCC construction of the relevant tariff language could have prospective effect only**. At the time, Charles Helein, counsel for one of the plaintiffs, predicted that:
>
> > ….if and when AT&T ever submits the issue framed by this Court, AT&T intends to saddle it with numerous unrelated tariff issues requiring notice and comment rulemaking.
>
> In response, on November 1, 1995, AT&T denied plaintiff's allegations stating that no deliberate delay had been orchestrated by AT&T, and that such allegations

> were now moot since AT&T had filed Transmittal No 9229 on October 26, 1995. Additionally, AT&T contested plaintiffs' allegation that any tariff transmittal determined by the FCC could only have prospective effect --- contending that the tariffs in question had never permitted fractionalization of plans and service and that **the outcome of the Tariff Transmittal No. 9229 would establish that conclusion without question.**

AT&T misled Judge Politan that Tr9229 like Tr8179 was being filed under a Substantive Cause Pleading, so it may have retroactive application to prevent the CCI-PSE transfer. Judge Politan was led to believe Tr9229 was now the new tariff change that was going to resolve the simple question of whether traffic only can be transferred without the plan—the Tr8179 issue.

NJFDC Judge Politan March 1996 Decision Page 12

> In the instant case, plaintiffs have asserted that AT&T withdrew Transmittal No. 8179 in an effort to further thwart plaintiffs' business by delaying an FCC determination favorable to their position in this case. AT&T refutes this contention by arguing that the withdrawal of the initial transmittal was in compliance with the **FCC's request** that the transmittal be withdrawn and refiled. See Second Supplemental Certification of Richard R. Meade, Para 11.

The FCC's main issue with Tr. 8179 was it allowed AT&T to subjectively measure intent to deprive AT&T of the revenue commitment that under the tariff must stay with the non-transferred plan on a traffic only transfer. The FCC advised AT&T that if AT&T did not withdraw or defer Tr. 8179 the FCC was going to **suspend or reject it.** Even if the FCC was going to allow the Tr. 8179 tariff change it would have went into effect prospectively 15 days as the FCC Decision stated. [1]

March 1996 Decision continued…page 12

> "Richard Meade, a Senior Attorney with defendant AT&T Corp.' (id. at para 1), "did not understand the Court's reference of this issue to the FCC to mean that **the Court was relying on Transmittal No. 8179 to resolve the issue**." Id. At para 12. Such a misunderstanding –by a party's senior counsel ---gives the Court pause, especially so in light of the revised transmittal filed by AT&T. It appears that, rather than attempting to resolve the fractionalization issue sub judice in an expedited manner, AT&T decided to air all of its concerns at this time with the FCC. **Apparently, somewhere in the morass which is Transmittal No. 9229 can be found the issue of fractionalization**, although this Court is at a loss as to its exact location is a submission which more than half inch thick, and has neither a table of contents nor an index. (See Supplemental Certification of Richard R. Meade, Ex A)"

[1] FCC 2003 Decision: Page 11 fn 73:
As we discuss in Section **Error! Reference source not found.**, below, a tariff transmittal is a carrier-initiated document which, if not withdrawn or deferred by the carrier, or suspended or rejected by the Commission, becomes effective, *i.e.*, **modifies the tariff, within a certain number of days from the transmittal filing date.** *See* 47 U.S.C. § 203(a), (b); 47 C.F.R. § 61.58(a), (b). Until the transmittal becomes "effective" it is not part of the tariff. In the interim, the carrier has the power to defer the effective date of a particular transmittal, file an amended version of it, or, as AT&T did in this matter, withdraw it.

TR 9229 was a prospective tariff filing –not a substantive pleading like Tr8179. AT&T's counsel Meade later certified to Judge Politan in **1996** that Tr9229 was a prospective tariff change. Additionally within the Tr9229 filing was the Security Deposit against potential shortfalls which detailed traffic only can transfer and the plan doesn't have to transfer under 2.1.8. All substantive tariff changes are prospective as the FCC 2003 Decision stated. [2]

Here as Exhibit A

> "On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the **CCI-PSE** transfer--- **the segregation of assets (locations) from liabilities (plan commitments) ---** in the following manner. See pg.7 para 15 Meade cert.

Here as Exhibit A

> "The Deposit for Shortfall Charges included in Transmittal No. 9229 is a **"new concept"** that meets AT&T's business concern more directly, without addressing the question of **intent.** Because this is new, it will apply only to newly ordered term plans, and so would **not be determinative** of the issue presented on the **CCI/PSE transfer**. (Meade certification pg.7 para 16)

So Mr. Meade certified to Judge Politan in 1996 that:

1) Under 2.1.8 traffic only can transfer without the plan
2) The plan obligations do not transfer on a traffic only transfer
3) The Tr9229 security deposits against potential shortfall is a tariff change and thus prospective and therefore not determinative of the CCI-PSE traffic only transfer.

The only question that Judge Politan had was whether the tariff permitted or did not prohibit traffic only transfers. AT&T in 1995 had explicitly detailed and conceded to Judge Politan that plan obligations do not transfer on a traffic only transfer as that was the fundamental basis of AT&T's sole defense of fraudulent use under tariff section 2.2.4 in 1995. There was no controversy or uncertainty as per which obligations transfer as plaintiffs agreed with AT&T and

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[2] **FCC Page 11 para 14:** Whether a Tariff Revision May Have Retroactive Effect

In their second request for declaratory relief, petitioners ask the Commission to find that "[u]nder standard tariffing law, principles, policies, and as required by the plain language of Section 203 of the Act, AT&T had no legal basis and could not have effectively tariffed any changes or additions to Section 2.1.8 or any other published provision of its Tariff F.C.C. No. 2, subsequent to January 1995, which could have substantively affected CCI's right to assign the traffic under its CSTP II plans to PSE in January, 1995."[2] AT&T does not address the retroactive application of tariff revisions.[2] **We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern the resolution of this matter.**

Judge Politan that CCI's revenue and time commitments on the non-transferred plans must stay with CCI.

NJFDC Judge Politan March 1996 Decision page 13 line 3 continued….

> "Suffice it to say that AT&T misspent over one hundred and forty days (from June 5 to October 26, 1995) 'fine-tuning' and 'clarifying' its transmittal. The end result of this effort is that **AT&T has obfuscated "the issue" referred by this Court to the FCC** and in so doing has prejudiced plaintiffs and delayed the determination of a concern of vital importance to them as expressed by this Court in the Opinion. The Court finds it incredible that AT&T's 'senior counsel' could not understand the Court's focus of concern from the unambiguous language of the Opinion. In its earlier determination, **the Court pinpointed the pivotal disagreement remaining between the parties to this litigation. The discreet issue then, as now, was whether AT&T must honor the fractionalization of the plans and service attempted by the plaintiffs.** There is no mystery. It appeared at earlier hearings in this matter that AT&T's litigation counsel clearly understood the **narrow issue** about which the Court was concerned. Indeed it was at AT&T's behest—**relying on the then-filed Transmittal No 8179**—that the Court refrained from deciding the fractionalization issue and referred it to the FCC. There is little to misunderstand. And yet the new transmittal, No. 9229, by virtue of its all-encompassing bulk, can be testimony to one of only two truths: either AT&T totally misunderstood the Opinion and in good faith included the kitchen sink in its new transmittal for fear of missing the true issue, or else it submitted the second transmittal after an unconscionable delay in an effort to elongate the process in hopes that time would moot the issue **by driving plaintiffs out of business."**

As the NJFDC Judge Politan stated the **narrow issue** was Tr. 8179--- simply whether AT&T could force plaintiffs to transfer the plan when substantial traffic was transferred ---as all parties understood that the plan obligations did not transfer on a traffic only transfer. Tr8179 was withdrawn by AT&T because the FCC told AT&T **in 1995** that it was going to reject it because Tr8179 enabled AT&T subjectively measure **intent** when asserting its fraudulent use defense to force a plan transfer to force the plan obligations to transfer. When the FCC denied AT&T's substantive cause pleading under Tr. 8179 to retroactively change 2.1.8 Judge Politan's Court in effect already had its primary jurisdiction referral.

Exhibit B Tr9229 AT&T's filing of Tr9229. Security Deposits Against Shortfall Charges.

Tr8179 was replaced by Tr9229 and exhibit B is the tariff page that resulted. AT&T counsel certified to Judge Politan that security deposits against potential shortfall was the way AT&T would handle large traffic only transfer without measuring fraudulent intent. (see supra Meade quotes pg. 4).

A key point that plaintiffs and Judge Politan did not see within "the morass of Tr9229" ---was the Tr. 9229 prospective tariff change AT&T made by adding security deposits against potential shortfalls. This tariff page conclusively shows that traffic only can be transferred without the plan—which explicitly answered Judge Politan's Court's May 1995 fractionalization question. This Tr9229 tariff page also conclusively answered the NJFDC's Judge Bassler's moot question

of 2006 regarding which obligations transfer under section 2.1.8. AT&T changed its position in 2006 and claimed that under section 2.1.8 that CCI must transfer its revenue commitments on a traffic only transfer; however the reason why AT&T had no evidence to support its bogus "all obligations" transfer assertion to NJFDC Judges Bassler and Wigenton is that the TR9229 tariff conclusively shows the revenue obligations absolutely do not transfer on a traffic only transfer. [3] AT&T Counsel Joseph misled Judge Wigenton when her Court asked about the security deposits and stated it had to do with the Inga –CCI plan transfer when it conclusively answered Judge Bassler's obligation question that the FCC's 2007 Order determined was outside the scope of the original referral. See pages 35-38 paras 87- 95 http://apps.fcc.gov/ecfs/comment/view?id=60001310889

In 1996 Judge Politan Rejects AT&T's Sole Defense of Fraudulent Use on its Merits

The NJFDC March **1996** Decision was vacated on primary jurisdiction grounds—not due to faulty analysis. The question referred by the Third Circuit in 1996 was again the same narrow question from **1995** regarding whether traffic only can be transferred without the plan. The original May 1995 NJFDC referred question, as Judge Politan stated, was before critical additional facts were presented to the NJFDC which mandated the March 1996 injunction.

AT&T's 1995 Fraudulent use assertion was **premised** on AT&T suspecting it would be deprived of **shortfall** on CCI's plans. Judge Politan issued an injunction and stated

> To the extent however that AT&T's demand for fifteen million dollars' security is **premised on the danger of shortfalls,** the Court finds that threat neither pivotal to the instant injunction **nor properly substantiated by AT&T**. March 1996 Politan Decision (page 19 para 1)

AT&T's demand for a security deposits **premised** on the dangers of shortfalls is a direct attack on AT&T's use of the fraudulent use provision, **premised** on suspecting shortfalls. There was **not** a controversy or uncertainty that the FCC needed to resolve for the NJFDC regarding fraudulent use. By 1996 Judge Politan clearly understood CCI's plans were pre June 17th 1994 grandfathered:

> A) Judge Politan: "Commitments and shortfalls are little more than **illusionary concepts** in the reseller industry—concepts which constantly undergo renegotiation and restructuring. The only "tangible" concern at this juncture is the service AT&T provides. The Court is satisfied that such services and their costs are protected. To the extent however that **AT&T's demand for fifteen million dollars' security is premised on the danger of shortfalls,** the Court finds that threat neither pivotal to the instant injunction **nor properly substantiated by AT&T**. March 1996 Politan Decision (page 19 para 1)

[3] When traffic only (end-user locations) were transferred without the plan being transferred to the new AT&T customer the calculation to determine the amount of security deposits simply compares the **non-transferred remaining revenue commitment** to the revenue (phone usage) generated from the end-user locations that did not get transferred away. This conclusively evidences that the revenue commitment does not transfer on a traffic only transfer.

B) Judge Politan: **"**Suffice it to say that, with regard to **pre-June, 1994 plans**, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff." May 1995 NJFDC Decision pg. 11

C) Judge Politan: "In answer to the court's questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do **escape termination and also shortfall charges** through renegotiating their plans with AT&T." May 1995 NJFDC Decision pg. 24

FCC Seeks to Assist NJFDC to Terminate a Controversy or Remove Uncertainty that by 1996 Was No longer There

Under the Administrative Procedures Act the FCC decides whether a declaratory ruling is necessary to "terminate a controversy or remove uncertainty" to assist the referring Court. However Judge Politan had already issued an injunction in March 1996 and said there is **nothing** under the tariff that would prohibit the transfer. By 1996 there was no controversy or uncertainty at the NJFDC.

The case went to the FCC and the FCC did nothing with it for 7 years (1996-2203). Probably because at that point there was no controversy or uncertainty since AT&T's substantial Cause Pleading under Tr. 8179 was rejected and AT&T's counsel Meade's certification conceded the Tr9229 security deposits on CCI's revenue commitment was prospective and therefore not determinative of the CCI-PSE transfer.

In 1996 the NJFDC Judge Politan had issued an injunction which by definition means his Court had no controversy to terminate or uncertainty to remove.

NJFDC March 1996 Judge Politan Decision Page 15-16:

> The Central issue in this **controversy** is whether plaintiffs may fractionalize "plans" as contracted between **AT&T and its aggregators** and as governed by Tariff F.C.C. No 2. Specifically, the question is whether plaintiffs may transfer traffic under a plan without transferring the plan itself in order to obtain more attractive discounts for end users. The issue of whether Tariff FCC No. 2 permits fractionalization has been referred by this Court to the F.C.C.

The controversy was simply whether traffic could be transferred without the plan. There was no other controversy as Judge Politan issued an injunction.

NJFDC March 1996 Judge Politan Decision Page 16 para 1:

> While not seeking to invade the F.C.C's area of expertise, **the Court finds nothing in the Tariff F.C.C. No. 2 which prevents fractionalization**, and contemplates a like finding by the F.C.C. Cleary, therefore, plaintiffs have established a strong likelihood of success on the merits.

NJFDC Judge Politan did not see where in the tariff language that section 2.1.8 explicitly allows traffic only transfers. His Court just stated that it does not see anywhere in the tariff that it prohibits traffic only transfers. Additionally the DC Circuit also did not see "on its face" that 2.1.8 explicitly allows traffic only transfers but decided that it does anyway:

DC Circuit Page 7:

> The Section **on its face** does not differentiate between transfers of entire plans and transfers of traffic

D.C. Circuit Decision stated on pg.8:

> Absent such reliance, the commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass transfers of traffic alone.

D.C. Circuit Decision stated on pg.10:

> First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and not just transfers of entire plans.

Actually section 2.1.8 does indeed differentiate "on its face" that "**any number"** of accounts can be transferred. Anything less than **ALL NUMBERS** means traffic as opposed to the plan can transfer.

See section 2.1.8 as show in the FCC 2003 Order at pg. 6 fn. 46 opening states:

> "Transfer or Assignment – WATS, including **any** associated telephone **number(s),** may be transferred or assigned to a new Customer, provided that:

Judge Politan did not see in section 2.1.8 that "**any" "number"** (the singular option of telephone number can transfer. If 2.1.8 only allowed plan transfers it would not say "any number(s)—it would only mandate "all numbers." Very simple—any amount of traffic can transfer from 1 account to everything but the lead home account.

AT&T's counsel Fred Whitmer detailed plan obligations do not transfer at the NJFDC 3/21/1995 Oral argument when AT&T was asserting its "Fraudulent Use" defense on cross examination of Mr. Inga:

> Whitmer: Q: Mr Inga, you know, do you not that if the service, **except for the home account**—or Mr. Yeskoo called it the **"lead account**" ---is transferred to PSE **the shortfall and termination liabilities remain** with Winback & Conserve, **isn't that correct?**
> Inga: Yes

Plaintiffs and AT&T agreed that plan obligations must stay with CCI's non-transferred plans. There was no controversy or uncertainty. NJFDC Judge Politan just did not see it in the tariff language.

The FCC in 2003 also did not see "on the face" of section 2.1.8 that it explicitly allowed traffic only transfers. In fact plaintiffs had always used section 2.1.8 to do traffic only transfers but in 1995 did not see specifically where in the language of section 2.1.8 that it explicitly allowed traffic only transfers under 2.1.8. Previous traffic only transfers were processed by AT&T using the same TSA forms. The only difference with the CCI-PSE transfer was the quantity of accounts that were transferring; however there is no conditions within 2.1.8 that mandates that more or less obligations transfer based upon the quantity of end-user business locations numbers were transferring.

Plaintiffs Cover Their Bases By Adding Additional Declaratory Rulings Besides Judge Politan's Referral

In addition to the District Court's primary jurisdiction referral plaintiffs also asked the FCC to decide additional declaratory ruling requests. One of them was whether the tariff in general prohibited traffic only transfers.

FCC 2003 Pg. 5 para 8:

> **A. Whether AT&T's Tariff Permitted the Movement of End-User Traffic Without The Plans**
> The district court asked "whether section 2.1.8 [of AT&T's Tariff] **permits** an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction." **Similarly,** petitioners' first request for declaratory relief asks the Commission to find that "[a]t the time of the attempted transfer … in or about January, 1995, by CCI to PSE of the end user traffic under the CSTP II plans held by CCI, **neither Section 2.1.8** of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff ... **prohibited CCI from transferring that traffic** without also transferring the CSTP II plans with which that traffic was associated."

FCC 2003 Pg.2

> We conclude that AT&T's tariff **did not prohibit such a movement of traffic and thus permitted it.** Accordingly, AT&T's conduct was unauthorized and violated section 203 of the Communications Act.

The FCC ruled in plaintiffs favor agreeing that section 2.1.8 nor any other section, **did not prohibit,** the movement of traffic only. In addition the FCC also determined other sections of the tariff expressly allowed CCI to delete accounts and PSE to add accounts without CCI's plan transferring and thus the FCC ruled against AT&T. The FCC's brief to the D.C. Circuit also made it clear that **not prohibiting** a transaction under 2.1.8 was just as much a tariff violation as **expressly permitting** the CCI-PSE transaction under 2.1.8 or any other tariff section.

Here as **EXHIBIT E** is the FCC's brief to the D.C. Circuit page 10:

> At the same time that it determined that **section 2.1.8 did not prohibit the movement of traffic between CCI and PSE**, the Commission also found that tariffs under which CCI and PSE took 800 service from AT&T allowed those resellers, respectively, to reduce and to increase the amount of 800 traffic they purchased under those tariffs. *Order*, para. 9 & n.52 (JA 7-8)

The FCC decided in favor of plaintiff's Declaratory Ruling request that **section 2.1.8** nor any other tariff section, did not prohibit traffic only transfers--- and the FCC also accepted the D.C. Circuit's decision that section 2.1.8 **expressly permitted** traffic only transfers.

The D.C. Circuit did not say that the following FCC's positions were in error:

1) Section 2.1.8 nor any other tariff section **does not prohibit** the transfers
2) Other tariff section expressly allows traffic only transfers by deleting and adding accounts.

The D.C. Circuit simply determined that the FCC made an error by stating that section 2.1.8 does not **expressly permit** traffic only transfers. Plaintiffs CCI-PSE transfer under 2.1.8 wins either way (expressly permits or does not prohibit).

Judge Politan, FCC and D.C. Circuit simply did not see within the ambiguous language of 2.1.8 where it allowed "any number" of the telephone numbers of the aggregated businesses to be transferred. The D.C Circuit Decision stated that it didn't see "on its face" that 2.1.8 allowed traffic only transfers; however the D.C. Circuit decided 2.1.8 allowed traffic only transfers despite not seeing where in the language of 2.1.8 that such transfers were expressly allowed.

The NJFDC and FCC were conflicted because all the evidence presented showed that under section 2.1.8 traffic only transfers were being permitted and after all it was the Transfer of Service Section; but NJFDC Judge Politan and FCC just didn't see where in the 2.1.8 tariff language it explicitly permitted traffic only transfers. Therefore the NJFDC was delayed by AT&T as the NJFDC waited on the FCC to determine Tr8179 to get an answer if "fractionalization" i.e. traffic only transfers were allowed. The FCC only determined that 2.1.8 did not prohibit traffic only transfers and the FCC erroneously determined that 2.1.8 did not expressly permit traffic only transfers.

The FCC got the Referral in 1996 and did not do anything with the case until 2003. AT&T in February 1995 had argued to the FCC in its denied Tr. 8179 Substantive Cause Pleading that AT&T could assert a fraudulent use defense. As AT&T's counsel Whitmer and Meade asserted AT&T's fraudulent use defense was due to the tariffed fact that since the revenue commitment does not transfer on CCI's traffic only transfer, AT&T was going to be deprived of collecting shortfall on the revenue commitment. That is why AT&T filed Tr.9229 to prospectively add security deposits against potential shortfall on large traffic transfers.

The FCC's AT&T regulatory advisor R.L. Smith in March 1995 advised the case manager Judy Nitche that AT&T's fraudulent use assertion already assumes there is fraudulent use and that is a judgment call that can't be resolved within the Declaratory Ruling process.

By 1996 Judge Politan said AT&T had no merit in asserting a fraudulent use defense. There was no fraudulent use controversy; however the FCC in 2003 revised the 1995 fraudulent use controversy. AT&T in 2003 got to 1st base arguing its fraudulent use defense that Judge Politan decided in 1996 AT&T had no merit to assert.

The Third Circuit believed that FCC was going to address the June 17th 1994 grandfathering issue. AT&T ended up again arguing fraudulent use in 2003 at the FCC when in 1996 Judge Politan stated fraudulent use was not an issue.

The Third Circuit reverted back to the question first posed by the District Court in **May 1995.** By the March **1996** NJFDC Decision Judge Politan said **facts have changed** and issued an injunction against AT&T as further evidence was discovered and Tr. 8179 was pulled by AT&T because the FCC advised AT&T that Tr8179 was going to be rejected by the FCC. Certifications were received from AT&T's Counsel Meade conceding that the CCI-PSE transfer would be prospective and the plans were still pre June 17th 1994 immune from shortfall and termination obligations and other aggregators were doing traffic only transfers.

March 1996 Decision page 14-15

> Applying the criteria for preliminary injunctions to the instant case, the Court finds, that the **interim relief requested by plaintiffs at this stage of the litigation is not only warranted, but is mandated by the evidence proffered.** Firstly, the Court finds that the scales of probability are tipped in favor of plaintiff's vis-à-vis likelihood of success on the merits. **The onus is on defendant** to convince the FCC that its Tariff No. 2 prohibits the type of transfer attempted by plaintiffs. AT&T was the drafter of the tariff language at issue and, as such, must withstand the effects of any inadequacies or ambiguities therein, especially since there remains a vital question whether the FCC's construction of the Tariff FCC No. 2 shall be accorded retroactive application. **Plaintiff's submissions suggest that a similar request form some other of AT&T's carriers has been granted by AT&T based upon its own construction of its Tariff language.**

March 1996 Decision page 15 fn6.

> As to this element of preliminary injunction analysis, plaintiffs contend—and defendant denies---that AT&T has authorized a fractionalization of the plan and traffic between other aggregators since the inception of the instant litigation. See H. Curtis Meanor's Letter and Attachments of December 15, 1995; Letter of December 21, 1995; Certification of Robert Collett; and Meanor Letter of January 29, 1196. **AT&T has submitted neither testimonial nor documentary evidence** to satisfactorily refute that representation. See, e.g., Letter of Frederick L. Whitmer, dated February 7, 1996.

AT&T was obviously doing traffic only transfers but continued to mislead Judge Politan by still denying that it allowed traffic only transfers without the plan being transferred.

After the May 1995 NJFDC Decision in June 1995 AT&T order processing manager Joyce Suek wrote that AT&T **"no longer"** was doing traffic only transfers. "No longer" obviously means AT&T had been doing traffic only transfers but AT&T stopped them. AT&T's Joyce Suek conceded to Mr Inga that AT&T counsel ordered the violation of AT&T's 2.1.8 tariff to stop quick and easy direct 2.1.8 transfers to contract tariffs that offered 66% discount instead of the 28% discounts under CSTPII/RVPP plans. As usual it was all about the money. AT&T did not appeal the 1995 NJFDC Decision which transferred the plans from Inga plaintiff's to CCI as the plans were still at only 28% discount. It was only when the traffic was going to PSE to get a 66% discount that AT&T chose to violate the tariff.

Below Ms. Suek's use of the term "Partial TSA's" means "traffic only" transfers under 2.1.8 **T**ransfer **S**ervice **A**greement (TSA).

Exhibit C

> Al --Per our Conversation, 6/19; an original TSA is now required for transfer activity. Additionally we **"no longer"** process partial TSA's, the TSA must be for the whole plan.

Section 2.1.8 did not change from the Jan 1995 version to when Joyce Suek made her "no longer" statement in June 1995. So Ms. Suek's statement that 2.1.8 **no longer** allowed a traffic only transfer was not due to an AT&T tariff change that stopped 2.1.8 transfers. Ms. Suek simply confirmed that at the time of the Jan 1995 CCI-PSE transfer that AT&T was allowing 2.1.8 traffic only transfers but simply violated its tariff, so as not to discount the $54.6 million in aggregate billing by an additional 38%. That's $20,748,000 reasons per year AT&T had to intentionally violate its tariff—not even including the substantial additional revenue that would be added due to the substantial additional profit margins.

The NJFDC did not send a referral to the FCC that included fraudulent use –AT&T's only denied defense. [4] By March 1996 Judge Politan did not have a controversial issue concerning fraudulent use. Judge Politan's Court was not concerned of AT&T fraudulent use defense: AT&T suspecting of being deprived of collecting shortfall on CCI's plans revenue commitment that under the tariff the revenue commitment had to remain with CCI's non-transferred plans. [5]

Judge Politan was not concerned about shortfalls at all. The many comments in his Decision state that shortfall on pre June 17th 1994 plans are "illusionary concepts." Judge Politan found AT&T's 2.2.4 fraudulent use defense was meritless as the plans were ordered prior to June 17th 1994 and thus were penalty immune.

Judge Politan was so certain of the issue based upon the new facts presented since the May 1995 decision that his Court issued an injunction and injunctions as Judge Politan stated: NJFDC March 1996 Decision pg11

> "(T)he grant of injunctive relief is an extraordinary remedy…which should be granted only in limited circumstances." "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous, in a doubtful case, than the issuing [of] an injunction. **Only when the plaintiff produces sufficient evidence to convince the Court that all four factors favor preliminary relief should an injunction issue**."

Judge Politan got vacated on primary jurisdiction grounds and never realized in 1995 that the explicit "any number" language within section 2.1.8 allowed traffic only transfers. Additionally he had within his possession in 1996 the "Tr. 9229 morass" in which the explicit tariff answer to his fractionalization question was that section 2.1.8 as used by CCI-PSE allowed traffic only transfers without the plan.

The FCC gets the case in 1996 from the Third Circuit that uses the **OLD May 1995 referral** when Tr8179 still had not been withdrawn by AT&T until June 2nd 1995 and all the new evidence and certifications had not yet been presented to the NJFDC. It was as if the time between May 1995 Decision and March 1996 Decision never existed as the case reverted to arguing AT&T's sole meritless defense of fraudulent use.

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[4] FCC's 2007 Order. Sole defense fraudulent use: FCC 2003 Pg.10 para 13.
"Because AT&T did not act in accordance with the **"fraudulent use"** provisions of its tariff, which did not explicitly restrict the movement of end-user locations from one tariff plan to another, AT&T cannot rely on them as authority for its refusal to move the traffic from CCI to PSE. **AT&T does not rely upon "any other provisions of its tariff" to justify its conduct."**

[5] The termination commitment also stayed with CCI but AT&T conceded to the FCC that the termination commitment was not an issue as CCI was not going to terminate its plans.
FCC page 8 fn 56.
Opposition at 5. Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) is **not at issue here**. Opposition at 3 n.1. That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter.

FCC 2003 Decision para 15 pg. 11:

> The Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "**terminate a controversy or remove uncertainty**." When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary **to assist the referring court.** Resolution of this issue is not necessary to assist the district court. After AT&T refused to permit petitioners to move the traffic, it filed Transmittal 8179 with the Commission in February 1995, which sought to amend Tariff No. 2. The district court's **May 1995 primary jurisdiction referral** to the Commission was based, in part, upon AT&T's contention that the Commission's consideration of Transmittal No. 8179 would clarify whether CCI was entitled, under the tariff, to move the traffic without the plans to PSE.

The FCC explicitly states it was ruling to terminate a controversy or remove uncertainty regarding the **May 1995 referral**. But by **1996** NJFDC Judge Politan no longer had a controversy or uncertainty regarding AT&T's sole defense of fraudulent use. But the FCC has to decide a controversy and since there only was one original controversy in 1995 the FCC was forced to revive the dead 1995 controversy.

NJFDC March 1996 Decision page 2:

> The events and facts giving rise to this **controversy** are set forth in the Opinion and need not be restated herein. However, **further developments** and certain conduct by the parties **subsequent to the Opinion** mandate that the Court now revisit the case

Post May 1995 Decision Tr8179 was withdrawn as the FCC advised AT&T it was going to reject Tr8179. AT&T replaced Tr8179 with a Tr. 9229 which was a **prospective tariff change**. By March 1996 there was no longer a controversy or uncertainty at the NJFDC.

R.L Smith was the FCC's regulatory interface with AT&T tariffs. Mr. Smith's 1995 FCC notes to the FCC's case manager Judy Nitche (obtained via FOIA) were written way back in March 1995 when AT&T lost its Tr8179 Substantive Cause Pleading to retroactively change 2.1.8. Mr. Smith indicated that there was a real issue with AT&T's fraudulent use defense raised in 1995 during AT&T's Substantive Cause Pleading. The issue was AT&T's self-serving ability to judge **intent.**

AT&T got to 1st base merely "suspecting" fraudulent use before ever establishing that there was merit to its fraudulent use defense. See the FCC's AT&T tariff expert R.L Smith's notes that were made February 21 1995 to FCC's case manager Judith Nitche. See Para B. Joint Appendix (JA) page 116

R.L Smith commenting on AT&T's fraudulent Use claim:

> Two things to keep in mind about this one. First **it indicates intent to** and that is a **judgment call** which would have to be decided in a complaint case if the matter came up.

Further down in the same para the FCC's Mr. Smith states:

> **'it does not even take intent into account but assumes it is there"**

The FCC was indeed in an unusual position by the time it got to the case in 2003. The FCC knew Tr8179 was withdrawn June 2nd 1995 ***after*** the NJFDC May 1995 Decision and Judge Politan therefore had its primary jurisdiction answer. However in 2003 the FCC could only go on what was referred to it in 1995. So the FCC asked the following question despite the fact that Judge Politan absolutely blasted AT&T for suspecting fraudulent use in his March 1996 Decision.

FCC 2003 Decision page 5 (continuation of para 7 from page 4)

> Second, the Bureau asked the parties to "comment on the remedy that AT&T's Tariff FCC No. 2 specifies that AT&T may exercise if AT&T has reason to believe that its customer is violating section 2.2.4.A.2 of that tariff by '[u]sing or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by … [u]sing fraudulent means or devices, tricks, [or] schemes.

In a very strange situation AT&T in 2003 again argued to the Commission that it suspected fraudulent use after the NJFDC in 1996 advised AT&T to come back and prove that its tariff allowed shortfall on pre June 17th 1994 plans. The FCC simply revived in 2003 the OLD Controversy of May 1995 as by 1996 it was no longer a non-controversy. [6]

The FCC could not address the merits of the fraudulent use issue as the FCC 2003 Order stated that the June 17th 1994 immunity provision (which obviously June 17th 1994 is prior to the Jan 13th 1995 traffic transfer) was not referred to the FCC. It simply was not referred because Judge Politan by March 1996 clearly understood the plans were penalty immune and Judge Politan **did not need to refer it.** [7]

DC Circuit Judge Ginsburg understood CCI keeps its customer plans revenue commitment but understood the plans were 6.17.94 grandfathered and thus penalty immune and actually completed the FCC's counsels' question during oral argument. The FCC explained the "Commission didn't rule on" the June 17th 1994 immunity provision that grandfathered plaintiff's plans. (Pg. 27 Line 2):

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[6] FCC 2007 Order FN 13 notes the "extensively briefed" comments of the parties in which AT&T asserted its fraudulent use defense that CCI's plan obligations do not transfer and therefore AT&T suspected fraudulent use.

[7] FCC 2003 Decision fn 94

With respect to petitioners' argument that AT&T's CSTP II shortfall charges set forth in Tariff No. 2 are facially unreasonable, we find this issue – **which was not referred to us by the district** court – to be irrelevant to our conclusion that AT&T violated its tariff.

MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this** that the **Commission didn't rule on.** I mean, for instance --
JUDGE GINSBURG: Whether they were **grandfathered?**
MR. BOURNE: **Right.** So it could well be that there were little or **no shortfall charges**.

The FCC's 2003 Decision did understand that there was no fraudulent use intent as it noted the plans were pre June 17th Ordered. The FCC was not referred the June 17th 1994 issue but the fact that the FCC included the following statement is indicative that the plans were grandfathered from shortfall penalties at the time of the Jan 1995 traffic only transfer.

FCC's 2003 Decision pg. 2 para 2:

> "**Prior to June 17, 1994**, the Inga Companies completed and signed AT&T's "Network Services Commitment Form" for WATS under AT&T's Customer Specific Term Plan II (CSTP II), a tariffed plan, which offered volume discounts off AT&T's regular tariffed rates."

The FCC also noted the facts of the case are that plaintiffs could get the traffic back within 30 days to meet commitments. Plaintiffs were not intending to deprive AT&T of shortfalls but intended to take the traffic back to meet commitments instead of restructuring its plan contracts out further in time. See FCC page 7 fn. 50:

> CCI and PSE did agree that the traffic could be **returned to CCI upon 30 days written notice from CCI that AT&T required CCI to meet its commitments.** *See* Exhibit G to Petition. Accordingly, at least theoretically, the traffic might have been returned to CCI at some point to enable it to meet any CSTP II obligations. *Cf.* Reply at 10 (arguing CCI would receive more net income, and thus have more money available to pay any charges, after the traffic was moved to PSE).

The FCC went ahead and issued a decision to deny fraudulent use. FCC 2003 Decision page 8 para 11:

> Based upon our review of AT&T's tariff, we conclude that, **even assuming** that AT&T reasonably suspected a violation of the **"fraudulent use"** provisions of its tariff – **which we do not decide** – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE.

The FCC made sure to note that this issue of whether or not AT&T had merit to raise a fraudulent use defense in the first place ----it did not decide. AT&T's fraudulent use defense was denied by the FCC anyway due to the illegal remedy. When the D.C. Circuit passed on correcting or remanding the FCC's decision back to the FCC it became the Law of the Case.

D.C. Circuit Decision Pg. 10 fn1

> The Communications Act **precludes us from addressing only those issues which the Commission has been afforded no opportunity to pass."** 47 U.S.C. Section 405(a).

The fraudulent use defense is predicated on the tariffed fact that plan obligations do not transfer on a "traffic only" transfer. The DC Circuit had the opportunity to address the fraudulent use issue that the FCC decided against AT&T. The D.C. Circuit did not find fault with the FCC's decision to deny AT&T's sole defense of Fraudulent use and did not either correct the FCC or remand the fraudulent use issue back to the FCC. AT&T used an illegal remedy and could not rely upon fraudulent use and this is the Law of the Case. [8]

The FCC's 2007 Order determined that Judge Bassler's 2006 Referral on which obligations transfer under 2.1.8 did not expand the scope of the original Third Circuit referral and thus was a moot issue. Judge Bassler's referral also asked the FCC to resolve any other open issues. However because the DC Circuit and the FCC counsels both stated that the DC Circuit Decision was not a remand that definition means there are no open issues.

Even if fraudulent use was still an open issue the real issue is the NJFDC in May 1996 has already taken the position that fraudulent use is not a controversial issue. As the FCC's R.L. Smith states the issue of intent can't be decided by the FCC as a Declaratory Ruling case. It is an issue for the NJFDC to decide. The issue of whether fraudulent use is there already is a DISPUTED FACT which the FCC stated is not appropriate for a Declaratory Ruling.

Besides the June 17th 1994 tariff provision additional evidence has now been discovered that the NJFDC has not seen, namely the FCC 1995 Order which explicitly states that it transcends the scope of that case. It explicitly states that AT&T was getting criticized by resellers for failure to adhere to the June 17th 1994 discontinuation w/o liability provision and section 2.1.8.

The cart got before the horse in this case. When the D.C. Circuit Judge Ginsburg is able to complete the sentence of the FCC's litigation attorney regarding the plans being grandfathered and thus penalty immune is an issue for the NJFDC. AT&T's own Counsels Richard Brown and Charles Fash conceded the plans were immune from penalties at the time of the Jan 1995 CCI-PSE transfer.

Furthermore the plans had already met their fiscal year revenue commitments. There was simply no reason to "suspect" fraudulent use in the first place as Judge Politan already determined. AT&T was able to escape justice based upon merely suspecting that plaintiffs were involved in a fraudulent scheme on plans in which its own counsels stated were immune and had already met its revenue commitments.

Incredibly to bolster its "fraudulent use" defense in 1995 AT&T submitted certifications from plaintiffs account manager Joseph Fitzpatrick. Mr. Fitzpatrick had a certification written for him

[8] If an appellate court (here D.C. Circuit) has not decided a legal question and the case goes to a lower court (here FCC) for further proceedings**, the legal question, (fraudulent use) not determined by the appellate court (D.C. Circuit) will not be differently determined on a subsequent appeal (Judge Bassler Referral) in the same case where the facts remain the same.** *Allen v. Michigan Bell Tel. Co.,* 232 N.W.2d 302, 303. Additionally an appellate court's determination on a legal issue is binding on both the trial court and FCC **and an appellate court (DC Circuit) on a subsequent appeal** given the same case and substantially the same facts. *Hinds v. McNair,* 413 N.E.2d 586, 607. (So both the FCC and DC Circuit by law must find that AT&T used an illegal remedy on fraudulent use so the case is moot. AT&T's fraudulent use position is based upon obligations not transferring and thus is the same as plaintiff's and answers Judge Bassler's 2006 referral.)

by AT&T's counsels in which Mr Fitzpatrick claimed the Mr Inga said he was "going out of business." AT&T totally twisted the words of plaintiff's president Mr Inga. Mr. Inga said "you are driving me out of business by discriminating against my company in refusing to provide my business with the same CT 516 that we qualify for." The connotation of Mr. Joseph Fitzpatrick's certification was: Mr Inga is planning of going bankrupt and not allowing AT&T to collect tariffed shortfall charges.

See EXHIBIT D. This is the same Joseph Fitzpatrick that claimed in another recorded conversation that the plans would forever be immune from the shortfalls. If plaintiff's president was intending to intentionally go bankrupt why would he advise AT&T of that anyway? Makes absolutely no sense as it was a manufactured defense not supported by actual facts. After Mr. Fitzpatrick retired he went to work for another aggregator and apologized and conceded to Mr. Inga that his actual words "kinda got twisted by AT&T's legal people."

The fundamental basis of does AT&T's sole defense of fraudulent use have any merit to begin with has already been denied by the NJFDC March 1996 Decision. Judge Politan's March 1996 Decision made perfectly clear supra: "the Court finds nothing in the Tariff F.C.C. No. 2 which prevents fractionalization." Nothing includes AT&T sole defense of fraudulent use.

Exhibit F See Email to AT&T's Counsel Richard Brown and FCC staff. Plaintiffs emailed AT&T February 5th 2016 and asked AT&T counsels to address its misrepresentation of the FCC 2007 Order. Plaintiffs followed up with another email on February 15th 2016 and this time copied all FCC Commissioners and FCC staff and asked AT&T to address its fancy manipulation of the FCC's 2007 Order. AT&T intentionally misrepresented the FCC's 2007 Order to the NJFDC Judge Wigenton. The FCC 2007 Order determined that Judge Bassler obligations allocation referral did not expand the scope of the original issue of fraudulent use and thus Judge Bassler's 2006 referral was moot. Plaintiffs February 5, 2016 letter to AT&T counsels on page 6 para 23 explicitly details AT&T's manipulation and misinterpretation of the FCC's 2007 Order that AT&T counsels engaged in before Judge Wigenton. AT&T has not commented at the FCC about the misrepresentation of the FCC's 2007 Order. AT&T can comment at the NJFDC.

Nor has AT&T commented on the fact that the case is over due to AT&T's failure to meet the 15 days statute of limitations within 2.1.8. See my letter of February 8, 2016.
http://apps.fcc.gov/ecfs/document/view?id=60001424046

The FCC explicitly states the NJFDC must resolve the (June 17th 1994) issue, discrimination, and unreasonable practices see (FCC 2003 Decision fn. 87 and fn. 94). Additionally the illegal billing remedy is a clear cut fact issue that Judge Wigenton can decide.

In summary, the evidence is now overwhelming that not only didn't AT&T's tariff section 2.1.8 "not prohibit" the CCI-PSE traffic only transfer," the tariff "explicitly permitted" traffic only to transfer. AT&T's sole defense of fraudulent use was not only denied by the FCC and reviewed by the DC Circuit; the fraudulent use defense as evidenced above didn't have any merit to begin with as decided by Judge Politan's Court in March 1996.

Very truly yours,
Raymond A. Grimes, Esquire
Cc: Client
Cc: FCC Comments

EXHIBIT A

need to obtain approval from the many different product management groups affected by the changes.

15. On October 26, 1995, AT&T Corp. filed Tariff Transmittal No. 9229 with the FCC. Transmittal No. 9229 addresses the problem implicated in the CCI-PSE transfer --- the segregation of assets (locations) from liabilities (plan commitments) --- in the following manner. (Relevant pages of Transmittal No. 9229 are attached hereto as Exhibit E.) Section 2.5.8.B (Shortfall Deposits) gives AT&T the right to demand a deposit to cover shortfall charges in the event: a) the term commitment is greater than one year; b) the customer has asked to remove locations (by transfer or otherwise) such that the remaining locations would generate charges less than 80% of the revenue commitment; and c) the customer's net assets are insufficient to secure against the risk of shortfall or the customer's financial responsibility is not a matter of record. Section 2.1.8 (Transfer of Service) of Transmittal No. 9229 specifies that AT&T has the right to reject a requested transfer if either party fails to pay a required deposit.

16. The Deposit for Shortfall Charges included in Transmittal No. 9229 is a new concept that meets AT&T's business concern more directly, without addressing the question of intent. Because this concept is new, it will apply only to newly ordered term plans, and so would not be determinative of the issue presented on the CCI/PSE transfer.

Exhibit B

2.5. Payments and Charges (continued) 2 Different TYPES

(1)

2.5.8. Deposits - The following deposit provisions are applicable to WATS. A deposit does not relieve the Customer of the responsibility for the prompt payment of bills on presentation. When a deposit is required, AT&T will provide a written notification of the amount of the deposit and an explanation of the reason(s) for the deposit requirement. When a deposit is required in connection with an order for new service or an AT&T Pricing Plan, the Customer shall pay the deposit within the period specified by the Company, which shall be a minimum of ten (10) days after the date of the deposit notification, except as provided in Section 2.5.10, following, in connection with a Contract Tariff order. AT&T may defer installation activity while a deposit demand is pending. When a deposit is required in connection with existing service, the deposit shall be paid within 30 days after the date of the deposit notification. If the Customer refuses to pay a deposit required under this Section, AT&T may refuse to provide new service, or restrict or deny existing service for which the deposit is required. If as a result of a Customer's refusal to pay such a deposit, the existing service is ultimately disconnected, the Customer shall be liable for all applicable termination charges. In lieu of a cash deposit, the Company will accept as a deposit or as a portion of the deposit amount, irrevocable and commercially sound Bank Letters of Credit, Surety Bonds, pledges of assets as security under the Uniform Commercial Code or similar statutes, or Guarantees, or any combination of cash and these instruments. C C

A. Deposit for Recurring Charges - The Company will require a deposit from a Customer (1) who has a proven history of late payments to AT&T or (2) whose financial responsibility is not a matter of record (determined in accordance with 1., following). AT&T will hold the deposit as security for the payment of charges. The amount of this deposit will not three times the sum of the estimated average monthly usage charges and/or the monthly service charges.

1. To determine the financial responsibility of a Customer and/or the specific amount of any deposit required, AT&T will rely upon commercially reasonable factors to access and manage the risk of non-payment. These factors may include, but are not limited to, payment history for telecommunications service, the number of years in business, history of service with AT&T, bankruptcy history, current account treatment status, financial statement analysis, and commercial credit bureau rating.

(2)

B. Deposit For Shortfall Charges - The Company will require a deposit from a Customer that meets each of the elements specified in 1. through 3., following, to be held as a **guarantee for the payment of any charge that may be incurred as a result of a failure to meet revenue or volume commitments** or monitoring conditions (Shortfall Charge) under an AT&T Pricing Plan (a term plan, flex plan, or other discount plan with revenue or volume commitments offered under this Tariff, or a Contract Tariff under which WATS is provided). The amount of this deposit will not exceed the **estimated Shortfall Charge**, to be determined in accordance with the applicable tariff provisions under which such Shortfall Charges would be assessed, based on the total annualized charges or usage calculated as specified in the applicable category under 2., following. A deposit will not be required under this Section if the amount of the estimated Shortfall Charge is less than $300,000. A deposit will be required when each of the three following requirements is met:

1. The Customer has subscribed to a Pricing Plan that includes a revenue or volume commitment based on charges or usage over a period of one year or longer.

2.5.6.B. Deposit for Shortfall Charges - (Continued)

2. The Customer is in one of the following categories (a) through (c). For purposes of these determinations, if any commitment under the Pricing Plan is based on charges or usage over a period of longer than one year, the commitment will be treated as an annual commitment equal to the amount of the commitment, divided by the number of months in the commitment period, multiplied by twelve. Mx .. .. Mx

(a) AT&T has accepted the Customer's order for service under the Pricing Plan and the Customer has identified at least one location or telephone number to be served under the Pricing Plan, but the total annualized charges or usage from all such identified locations and telephone numbers are less than 50% of the annual commitments applicable during the first year of the Pricing Plan. Such total annualized charges or usage will be twelve times the greater of (i) the past month's billed usage or (ii) the average monthly billed usage during the preceding twelve months, or if billed usage information is not available for the preceding twelve months, then during the number of preceding months for which such billed usage information is available. Mx Mx Cx .. Cx .. Mx

(b) The Customer has been taking service under the Pricing Plan for at least six full billing months, and the total annualized charges or usage under the Pricing Plan are less than 85% of any currently applicable annual commitment under the Pricing Plan. Such total annualized charges or usage will be twelve times the greater of (i) the past month's billed charges or usage or (ii) the average monthly billed charges or usage during the preceding twelve months, or if billed usage information is not available for the preceding twelve months, then during the number of preceding months for which such billed usage information is available. Cx Cx Cx Cx

(c) The Customer has requested that **AT&T remove specified locations or telephone numbers from the Pricing Plan**, and the total annualized charges or usage from the locations or **telephone numbers that would remain under the Pricing Plan** are less than 50% (during the first six full billing months of the term of the Pricing Plan), or 85% (after the sixth full billing month of the term of the Pricing Plan), **of any currently applicable commitment under the Pricing Plan**. Such total annualized charges or usage will be determined using the same methodology as specified in (b), preceding. Cx Cx

3. The Customer's net assets (based on a review of an audited financial statement, if available, and other information available to AT&T) are less than three times the amount of its total commitments to AT&T under tariffed service arrangements, or the Customer's financial responsibility is not a matter of record (determined in accordance with A.1., preceding).

C. Interest on a Cash Deposit - Interest will be paid to a Customer for the period that a cash deposit is held by AT&T.

Plaintiffs note: Obligations remain on the former customers plan as end-user locations are removed. AT&T covered itself whether accounts were either transferred away via 2.1.8 or deleted from plan via 3.3.1.Q. This was the (Tr.9229) outcome of the AT&T Counsel Meade certification to Judge Politan as to what AT&T was going to do in the future for large traffic only transfers. Make the former customer that had to keep the customer plan commitments post deposits against shortfall. This did not affect plaintiff's CCI-PSE transfer because as normal it was a tariff change that of course was prospective.

Certain material on this page formerly appeared on Page 28.
Certain material previously found on this page can now be found on Page 28.1.1.
x Issued on not less than one day's notice under authority of Special Permission No. 96-0468.

EXHIBIT C

One Stop Financial

55 Main Street, Little Falls, NJ 07424
Tel.: (800) 245-1826 Fax: (800) 338-0409

Date: 6/15/95

Page: 1 of 2

Facsimilie Cover Sheet

Attention: Joyce Sack

Phone #:

Fax#:

From: Al Lyga

Comments: Have transfer all BN's under Darren B. Swain Inc. to Al's plan, which only has a 403(b) investment. As we don't accept the plan I.d number

6/20/95 Al - Per our conversation yesterday Monday 6/19; an original TSA is now required for transfer activity. Additionally we no longer process partial TSA's, the TSA must be for the whole plan.

JSack

EXHIBIT D

Transcribed by Rizman, Rappaport, Dillon, & Rose
Certified Court Reporters
Tape 7 at 6-7:

Joe Fitzpatrick: If you get a new VPP number, you get a new plan. If you keep the same VPP number only with a new start date, **it's not a new plan.** So if they should give you a new plan VPP number....
Mr. Inga: Yeah
Joe Fitzpatrick You were given a new plan.
Mr. Inga: Alright but say the VPP stays the same.
Joe Fitzpatrick: Stays the same, all you have then is a new TASD –Term Assumption Starting Date, you have and original plan whatever TAS you wanna call that an ABC plan or whatever but its, its just a new TAS date. If you were grandfathered, you know how that game is played.
Mr. Inga: Now what I am saying is this, theoretically, there can never be a penalty assessed on a restructured plan because that plan—because AT&T has already interpreted that a restructure is not a new plan, that TAS date will start but the VPP ID, VPP dictates whether it's a new plan or not.
Joe Fitzpatrick: If you kept the same VPP number---
Mr.Inga Yes.
Joe Fitzpatrick: The plan that you started prior, you know in June of '94, prior to 6/17 **as long as that VPP number doesn't change**, they can track back in the system and say that was a –they can show when it was originally started, it was a pre 6/17 plan, it's **grandfathered.** True, you may get new TAS dates every time you restructure and as long as you do the restructure---if you time it right, if you screw up somehow and don't time it right, that system is gonna kick in and hit you for shortfall. So you just need to, you know, keep your clock there to tell you when to restructure.

AT&T Manager Confirmed that Pre 6/17/94 Plans will always remain GRANDFATHERED Immune from Shortfall and termination charges.

EXHIBIT E

At the same time that it determined that section 2.1.8 did not prohibit the movement of traffic between CCI and PSE, the Commission also found that the tariffs under which CCI and PSE took 800 service from AT&T allowed those resellers, respectively, to reduce and to increase the amount of 800 traffic they purchased under those tariffs. *Order*, para. 9 & n.52 (JA 7-8) (citing AT&T Tariff F.C.C. No. 2 (applicable to the CSTP/II RVPP plan taken by CCI) and AT&T Contract Tariff 516 (applicable to the plan taken by PSE)). The Commission determined that that was, in effect, what CCI and PSE were seeking to do with their requests to move traffic, and "that AT&T's respective tariffs with CCI and PSE permitted it." *Order*, para. 9 (JA 8). In arriving at the conclusion that section 2.1.8 of Tariff No. 2 did not prohibit the requests made by CCI and PSE to transfer traffic, the Commission rejected AT&T's contention that section 2.1.8 did not permit the transfer of traffic without a plan unless the transferee assumed the original customer's liability. *Id.*, para. 9 (JA 6-8). The Commission stressed, however, that even with the transfer of traffic, "CCI still would have to meet its tariffed commitments." *Id.* (JA 7).

As part of their first request for declaratory relief, the petitioning resellers sought a determination that no provision of Tariff No. 2 – not just section 2.1.8 – prevented CCI from transferring its traffic without also transferring the plans associated with that traffic. AT&T asserted before the Commission (and the District Court) that the petitioners' requests were intended to enable CCI to avoid payment, and therefore "violated the 'fraudulent use' provisions of Section 2.2.4" of Tariff No. 2 and justified AT&T's refusal to accept the transfer from CCI to PSE. *Order*, para. 10 (JA 8).[6] Without deciding the issue, the Commission concluded that

---

[6] "[AT&T] claim[ed] that the transfer from CCI to PSE 'had both the purpose and the effect of avoiding the payment, in whole or in part, of tariffed shortfall ... charges' because CCI's entire revenue stream would transfer to PSE, but PSE would have no corresponding obligation to pay any shortfall charges under the CSTP II." *Order*, para. 10 (JA 8).

EXHIBIT F

From: Al Inga [mailto:ajdmm@optonline.net]
Sent: Monday, February 15, 2016 9:28 AM
To: 'Brown, Richard H.'; 'ray@grimes4law.com'; 'Deena Shetler'; 'Pamela Arluk'; 'john.Ingle@fcc.gov'; 'Ajit Pai'; 'Jessica Rosenworcel'; 'Robert McDowell'; 'Kay Richman'; 'Sharon Kelley'; 'Jane Halprin'; 'Julie Veach'; 'KJMWEB@fcc.gov'; 'Sharon Gillett'; 'MeredithAttwell.Baker@fcc.gov'; 'Michael.Copps@fcc.gov'; 'Jonathan.Adelstein@fcc.gov'; 'Eddie.Lazarus@fcc.gov'; 'Zachary Katz'; 'thomas.wheeler@fcc.gov'; 'Mike ORielly'; 'Mignon Clyburn'; 'Jessica Rosenworcel'; 'robert.ratcliffe@fcc.gov'; 'eric.botker@fcc.gov'; 'Jane Halprin'; 'Julie Veach'; 'Kay.Richman@fcc.gov'; 'KJMWEB@fcc.gov'; 'Matthew Berry'; 'robert.ratcliffe@fcc.gov'; 'Sharon Kelley'; 'Tom Wheeler'; 'Suzanne Tetreault'; 'David Gossett'; 'Jennifer Tatel'; 'Karen.onyeue@fcc.gov'; 'Stephanie Weiner'; 'Madelein.findley@fcc.gov'; 'Jim Bird'; 'Jamilla.ferris@fcc.gov'; 'John Williams'; 'Linda Oliver'; 'Richard Welch'; 'john.Ingle@fcc.gov'; 'Randolph Smith'; 'Pamela Arluk'; 'Jay Keithley'; 'eric.botker@fcc.gov'
Cc: Brown, Richard
Subject: RE: Richard---AT&T Counsels intentionally deceived Judge Wigenton....

Richard Brown

On February 5th 2016 plaintiffs asked you to comment at the FCC on AT&T's intentional misrepresentation to Judge Wigenton regarding the FCC 2007 Order. AT&T misled Judge Wigenton by stating the FCC 2007 Order meant the scope of the case was Judge Bassler's 2006 referral on which obligations transfer under 2.1.8.

Plaintiffs have detailed AT&T's misrepresentation at
http://apps.fcc.gov/ecfs/comment/view?id=60001391838

See page 6 para 23

FCC 2007 Order Determines Judge Bassler Obligations Referral Does Not Expand the Scope of the Third Circuit Referral on Fraudulent Use --Evidence Discovered that AT&T Intentionally Misled NJFDC Judge Wigenton

The 2007 FCC Order was written by case manager Deena Shetler for Thomas J. Navin and the FCC's intention was to assist the NJFDC by advising it that Judge Bassler's referral on which obligations transfer under 2.1.8 did not expand the scope of the original referral and controversy of fraudulent use under 2.2.4 of AT&T's tariff. AT&T counsel did just the opposite of what the FCC Order intended.

Deena must have spent a very long time researching through all the original comments of the parties in which she listed them all at fn 13 of the FCC 2007 Order to explicitly show the District Court how extensive the comments were on the subject of which obligations transfer. The whole point that the FCC 2007 Order made was that in 1995 there was **no controversy or uncertainty at the District Court in 1995 regarding which obligations transfer** as AT&T's only defense of fraudulent use asserted that CCI must keep its revenue and time commitment on the non-transferred plan---which Judge Politan and plaintiffs all agreed that is the terms and conditions for traffic only transfers under section 2.1.8.

AT&T counsels left out the first two sentences of the paragraph which you partially quoted from within the 2007 FCC Order and then left out several key words in the 3rd sentence to then spin the FCC 2007 Order 180 degrees. This is not client advocacy. This is intentional misrepresentation on Federal Judge Wigenton.

Plaintiff's understand why AT&T counsels are not addressing AT&T's manipulation of the FCC Order to the FCC but plaintiffs expect Judge Wigenton will not be too happy that AT&T counsels intentionally misled her Court. It will now make perfect sense to Judge Wigenton why the FCC since 2006 did not decide which obligations transfer---it is a moot issue.

AT&T has not addressed many of the intentional misrepresentations on Judge Bassler and on Judge Wigenton during the March 2015 Oral argument that are detailed with numerous exhibits within plaintiffs FCC comments on the FCC server at http://apps.fcc.gov/ecfs/comment/view?id=60001310889

The one good thing AT&T counsels manipulation and "word smith" maneuvers of the FCC 2007 Order did was confirm that AT&T knew all along Judge Bassler's obligation allocation referred question was not within the scope of the case.

Additionally AT&T has also not commented on the fact that AT&T misrepresented w/o evidence to the DC Circuit that it met the 15 days statute of limitations date within section 2.1.8 by denying the CCI-PSE transfer on Jan 27th 1995. AT&T knew it had no evidence of the Jan 27th 1995 date so AT&T then misled the FCC in 2008 that a Jan 23rd 1995 document was the CCI-PSE denial within 15 days. However a close look at that Jan 23rd 1995 document shows it did not deny the CCI-PSE transfer. It is outlined on FCC server at http://apps.fcc.gov/ecfs/document/view?id=60001424046 but again AT&T is not commenting.

Al Inga
Group Discounts Inc.

From: Al Inga [mailto:ajdmm@optonline.net]
Sent: Friday, February 05, 2016 2:30 PM
To: 'Brown, Richard H.'; 'ray@grimes4law.com'
Cc: 'Deena Shetler'; 'Pamela Arluk'
Subject: RE: Richard---Plaintiffs response to AT&T's 1 22 16 and 2 1 16 comments

Richard

Thank you for confirming receipt of plaintiffs' FCC comments.

Plaintiffs would like for AT&T to address the misrepresentation of the FCC 2007 Order to Judge Wigenton. That was very fancy maneuver to pick up the sentence in the middle and compare it to the penalty infliction and assert it was the obligations issue under 2.1.8 which needed to be decided.

I knew as soon as AT&T counsels stated that it was a block quote w/o stating what the "block quote" was that there had to be some maneuver AT&T counsels were up to! LOL

I also had to laugh at your assertion that you were just “paraphrasing” the former customer as the transferor! I was hysterical laughing over that one.

I wonder what Deena thinks of AT&T twisting the FCC 2007 Order to a federal Judge. I wonder if Deena believes AT&T was just paraphrasing!”

Why didn’t AT&T address the TR 9229 security deposits against shortfalls in its 2.1.16 brief?

Al Inga
Group Discounts, Inc.

From: Brown, Richard H. [mailto:rbrown@daypitney.com]
Sent: Friday, February 05, 2016 2:14 PM
To: 'Al Inga'; ray@grimes4law.com
Subject: RE: Richard---Plaintiffs response to AT&T's 1 22 16 and 2 1 16 comments

Received.